

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

EDWARD M. MARSHALL,

Plaintiff and Appellant,

v.

CALIFORNIA DEPARTMENT OF  
HEALTH SERVICES,

Defendant and Appellant.

B158777

(Los Angeles County  
Super. Ct. No. BS066512)

APPEAL from a judgment of the Superior Court of Los Angeles County.

David P. Yaffe, Judge. Affirmed in part and reversed in part.

Bill Lockyer, Attorney General, Manuel M. Medeiros, Solicitor General, Andrea Lynn Hoch, Chief Assistant Attorney General, James M. Humes and Sandra L. Goldsmith, Deputy Attorneys General for Defendant and Appellant.

Buckner, Alani, Khouri, Chavos & Mirkovich, Michael J. Khouri, and Teresa L. Polk for Plaintiff and Appellant.

---

Appellant Edward M. Marshall (Marshall) filed a petition for writ of mandate with the superior court to challenge the decision of respondent California Department of Health Services (the Department) to temporarily suspend his Medi-Cal privileges pending a fraud investigation and to withhold his Medi-Cal payments. The trial court denied Marshall's petition as to his Medi-Cal privileges, but granted relief with respect to the withheld payments. Marshall appealed, contending that he was deprived of a liberty interest in his Medi-Cal privileges without due process and that the Department's decision was arbitrary and capricious. The Department cross-appealed on the theory that the withhold was proper. According to the Department, its withhold notice satisfied all statutory requirements, Marshall does not have a protected property interest in his Medi-Cal payments, and even if Marshall does have a protected property interest in the payments, he received due process.

We affirm as to the suspension of privileges, but reverse as to the constitutionality of the withholding.

## **FACTUAL AND PROCEDURAL HISTORY**

### **1. The investigation, withholding, and suspension.**

On March 27, 2000, the Department made an unannounced visit to Marshall's medical clinic and carried out an inspection of his practice.

Based on the evidence it gathered from its onsite inspection, the Department concluded that it had reliable evidence of fraud, abuse, or willful misrepresentation to justify the withholding of 100 percent of Marshall's Medi-Cal payments pursuant to Welfare and Institutions Code section 14107.11<sup>1</sup> and Title 42 of the Code of Federal Regulations part 455.23. Additionally, it placed Marshall under investigation for fraud or abuse and deactivated his Medi-Cal provider number pursuant to section 14043.36. On May 25, 2000, the Department sent Marshall a letter (the letter) notifying him that his

---

<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Medi-Cal payments were being withheld and that his provider privileges were being suspended.

## **2. Administrative proceedings.**

Marshall challenged the Department's actions by submitting an administrative appeal on June 27, 2000.

On September 21, 2000, the hearing officer issued an appeal finding upholding both the withhold of payments and suspension of privileges. The hearing officer concluded: "The Department has demonstrated that there is reliable evidence, specifically that [Marshall] shared beneficiaries with other providers and that he billed and was paid for services he did not perform, to support its contention of fraud or willful misrepresentation by [Marshall] under the Medi-Cal program. Therefore, the Department's action to temporarily withhold payments from [Marshall's] provider number is upheld. [¶] Based on the onsite visit, the Department concluded it had sufficient reliable evidence that [Marshall] committed fraud, abuse or willful misrepresentation under the Medi-Cal program. Based on this conclusion, the Department placed [Marshall] under investigation and temporarily suspended and deactivated provider number 00A201960. The Department's action is supported by [section 14043.36, subdivision (a)]. Therefore, the Department's action to temporarily suspend and deactivate [Marshall's] provider number is also upheld."

On September 25, 2000, the Department notified Marshall that it was adopting the appeal finding as its decision.

## **3. Trial court proceedings.**

Pursuant to Code of Civil Procedure section 1085, Marshall filed a petition for writ of mandate challenging the Department's decision on substantive and due process grounds.

At the initial petition hearing held on February 8, 2002, the trial court indicated that it would grant the writ as to the withheld funds on the grounds that the notice given to Marshall was defective, stating: "I'm not buying his story. I'm not granting relief here because I believe that [Marshall] didn't know what was going on here. I mean, he's

asking me to believe that he believes the tooth fairy. I mean, he rents out his provider number to this criminal, who then supplies him with an office and a stream of patients that come in by the vanload, and he sees the patients and then let's the criminal bill the state for whatever the criminal decides to bill the state for, and he wants me to believe that he's got no idea that these patients are not being paid to come in and see him, or that the person that's using his provider number is misusing it. [¶] I don't believe that for one moment, and I'm certainly not granting him relief because I do. I'm granting him relief because there are constitutional issues at stake here that I think are being disobeyed or trying to be evaded by the state here. And that is that the guy is entitled to some kind of a real hearing before you take action against him."

At the continued hearing on March 14, 2002, the trial court stated that it was satisfied that "[Marshall] knew that the management service and the billing agent were defrauding [Medi-Cal], and allowed himself to be used to facilitate that fraud." The trial court ordered the Department to release the withheld funds "[b]ased on my finding that the withhold is not temporary. And it has to be temporary because otherwise the statute is unconstitutional. You can't permanently deprive someone of property without giving them notice and an opportunity to be heard and still have the statute be constitutional. [¶] . . . And the temporary nature of the withhold, it appears to [the court], is simply illusory. The withhold is for as long as [the Department] wants it to be in effect."

The trial court denied the writ as to the deactivation of provider privileges and suspension of Medi-Cal privileges, stating: "I do not believe that the reasons why I'm granting relief here applies to the provider number. I don't think he has a property interest in his provider number. And if he has a liberty interest, I don't think there has been sufficient evidence to show that he hasn't received whatever it is he's entitled to to protect the liberty interest, which is the right to explain -- if it does in fact reflect upon his reputation, he has a right to explain himself, but I think he's done that. [¶] But these due process elements that are necessary in order to deprive him of property permanently or indefinitely do not apply, I do not believe, to the deactivation of his provider number."

This timely appeal followed.<sup>2</sup>

### STANDARD OF REVIEW

Code of Civil Procedures section 1085, subdivision (a) provides: “A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, . . . to compel the admission of a party to the use and enjoyment of a right . . . to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person.”

The two requirements for mandamus relief are “(1) a clear, present and usually ministerial duty on the part of the respondent, and (2) a clear, present and beneficial right in the petitioner to performance of that duty. [Citation.] And, while mandamus is not available to control the discretion exercised by a public official or board, it is available to correct an abuse of discretion by such party. [Citation.]” (*Barnes v. Wong* (1995) 33 Cal.App.4th 390, 394-395 (*Barnes*).)

The trial court reviews an agency’s actions to determine whether they were arbitrary, capricious, entirely lacking in evidentiary support or contrary to required legal procedures. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34-35, fn. 2.) On appeal, the reviewing court must determine whether the trial court’s decision is supported by substantial evidence and otherwise in accordance with the law. (*Goldberg v. Barger* (1974) 37 Cal.App.3d 987, 994; *Barnes, supra*, 33 Cal.App.4th at pp. 394-396.) When a “contention regarding procedural matters presents a pure question of law involving the application of the due process clause, we review the

---

<sup>2</sup> We granted the Department’s request to take judicial notice of the accusation it filed against Marshall on January 21, 2003. The accusation seeks indefinite suspension of Marshall’s provider privileges. Also, we take judicial notice of Marshall’s February 7, 2003, notice of defense and request for a hearing. Conversely, we denied the Department’s request to augment the record to include two declarations that were created after judgment was entered. “Augmentation does not function to supplement the record with materials not before the trial court.” (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.)

trial court's decision de novo.' [Citation.]" (*Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 107.)

## DISCUSSION

### I. The suspension of Medi-Cal privileges.

Marshall complains that his right to due process was violated because he was denied a hearing after his privileges were suspended. Also, he complains that the evidence was insufficient to demonstrate fraud or abuse, rendering the Department's decision arbitrary and capricious.

These complaints are unavailing.

#### A. *Liberty interest.*

Upon examination, we conclude that Marshall failed to demonstrate that he has a liberty interest in his Medi-Cal privileges.

The due process clause of the federal Constitution provides that a person may not be deprived of life, liberty, or property without due process of law. (U.S. Const., 14th Amend., §1.) A due process claim is cognizable only if there is a recognized liberty or property interest at stake. (*Erickson v. U.S. ex rel. Dept. Health and Hum. Ser.* (9th Cir. 1995) 67 F.3d 858 (*Erickson*).) A plaintiff may have a liberty interest if "his good name, reputation, honesty, and integrity are jeopardized because due process was denied him. [Citation.] [However,] [r]eputational damage alone, no matter how egregious, is insufficient to support a claim of liberty deprivation. [Citation.] Some other tangible interest such as employment must also be involved." (*Koerpel v. Heckler* (10th Cir. 1986) 797 F.2d 858, 865 (*Koerpel*).)

Marshall relies on *Erickson* to support his contention that a Medi-Cal provider has a liberty interest raising due process concerns if the government suspends his privileges. In *Erickson*, the court applied the following test from *Vanelli v. Reynolds School Dist. No. 7* (9th Cir. 1982) 667 F.2d 773, 777-778 (*Vanelli*): "A person's liberty interest is implicated if a charge impairs his reputation for honesty or morality. [Citations.] 'The procedural protections of due process apply if the accuracy of the charge is contested, there is some public disclosure of the charge, and it is made in connection with the

termination of employment or the alteration of some right or status recognized by [ ] law.’ [Citations.].” (*Erickson, supra*, 67 F.3d at p. 862.)

In his briefs, Marshall makes no argument that a suspension is a charge under *Vanelli* or that his suspension was publicized. Moreover, we have reservations about whether a temporary suspension pending a Medi-Cal fraud investigation constitutes a charge. But even if it is a charge, there is no evidence of publicity, nor has Marshall suggested that his temporary suspension will be published in the future, which is fatal to Marshall’s position on appeal.

Marshall cites various cases in support of his cause, but they are distinguishable. The physician in *Erickson, supra*, 67 F.3d 858 was convicted of Medicare fraud and was notified that he would be suspended from Medicare and other federally funded health programs for 15 years. (*Id.* at p. 860.) The *Erickson* court held that the physician was entitled to due process because he was challenging his fraud conviction, his suspension was going to be publicized, and his status was being altered. (*Id.* at p. 862.) In *Koerpel, supra*, 797 F.2d 858, publication of the physician’s disqualification for Medicare reimbursements had not occurred, but publication in the near future was required by law. (*Id.* at pp. 860, 866-865.) As a result, the court found the plaintiff’s claims to be colorable. (*Id.* at p. 866 [“While we do not conclude that Dr. Koerpel’s liberty interest has been infringed, we do hold that under the unique posture of this case, his allegations of deprivations of liberty are sufficiently colorable to obtain the jurisdiction of the federal court.”].) The issue in *Cassim v. Bowen* (9th Cir. 1987) 824 F.2d 791 (*Cassim*) was the appropriate process due to a physician before his suspension from the Medicare program could be published in the newspaper. The respondent conceded the existence of a liberty interest, so the Ninth Circuit did not have to reach that question. (*Id.* at p. 798.) Upon a close reading, it is undeniable that each of these cases involved a publicity element that is missing in the instant case.

Due to the absence of a protected liberty interest, we need not reach Marshall's other due process arguments.

*B. Substantial evidence supports the finding that the Department's decision was not arbitrary or capricious.*

Section 14043.36, subdivision (a) provides in relevant part: "If it is discovered that a provider is under investigation by the department or any state, local, or federal government law enforcement agency for fraud or abuse, that provider shall be subject to temporary suspension from the Medi-Cal program, which shall include temporary deactivation of all provider numbers used by the provider to obtain reimbursement from the Medi-Cal program."

The only prerequisite to the suspension of privileges was the existence of an investigation. There is no dispute that the Department was investigating Marshall's billing practices. This was substantial evidence that the prerequisite to suspension was met, and also that the Department did not act in an arbitrary and capricious manner. The trial court correctly upheld the suspension and denied the petition for writ of mandate. Conversely, the record fails to establish that the Department had a clear and present duty to lift Marshall's suspension, and that he had a clear and present beneficial right to have the Department perform that duty.

## **II. The withhold of Medi-Cal payments.**

The Department contends that the trial court erred in granting the petition as to the withhold because (1) Marshall does not have a property interest in his withheld Medi-Cal payments, (2) the Department's notice of withhold satisfied all relevant statutory requirements, and (3) even assuming he had a property interest in the withheld funds, he received adequate due process.

We examine each issue in turn.



A. *Property interest.*

Contrary to the Department's position, we conclude that Marshall does have a property interest at stake. We follow the lead of *Bergeron*, which held that a dentist had a property interest in temporarily withheld Medi-Cal payments pending a fraud investigation. (*Bergeron v. Department of Health Services* (1999) 71 Cal.App.4th 17, 23 (*Bergeron*).)

Relying on *Midwest Family Clinic, Inc. v. Shalala* (E.D. Mich. 1998) 998 F.Supp. 763, 771 (*Midwest*), *Levin v. Childers* (6th Cir. 1996) 101 F.3d 44, 46, *Clarinda Home Health v. Shalala* (8th Cir. 1996) 100 F.3d 526, 531 (*Clarinda*), *Peterson v. Weinberger* (5th Cir. 1975) 508 F.2d 45 (*Peterson*), and *American Mfs. Mut. Ins. Co. v. Sullivan* (1999) 526 U.S. 40, the Department contends that Marshall cannot have a property interest if his payments are in dispute. However, this contention is belied by *Lujan v. G & G Fire Sprinklers, Inc.* (2001) 532 U.S. 189, 194 (*Lujan*).) *Lujan* involved a subcontractor who claimed a right to receive funds that were withheld after it violated California's prevailing wage laws. Even though there was no present entitlement, *Lujan* held that the subcontractor still had a property interest at stake and was therefore entitled to receive due process. (*Id.* at p. 197.)

B. *The notice of withhold.*

Due process requires "notice reasonably calculated to apprise interested parties of the pendency of the action affecting their property interest and an opportunity to present their objections. [Citation.]" (*Bergeron, supra*, 71 Cal.App.4th at p. 24.)

Title 42 of the Code of Federal Regulations part 455.23 requires a notice of a temporary withhold to set forth the allegations and state, inter alia, that the withhold will not continue after the agency determines there is insufficient evidence of fraud or legal

proceedings related to the fraud are completed.<sup>3</sup> Section 14107.11 imposes substantially the same notice requirements.<sup>4</sup>

The letter notified Marshall that his payments were being temporarily withheld pursuant to Title 42 of the Code of Federal Regulations part 455.23 and part 14107.11, it set forth the evidentiary support for the withhold based on fraud or abuse, and it informed

---

<sup>3</sup> Title 42 of the Code of Federal Regulations part 455.23, subdivision (b) provides: “The State agency must send notice of its withholding of program payments within 5 days of taking such action. The notice must set forth the general allegations as to the nature of the withholding action, but need not disclose any specific information concerning its ongoing investigation. The notice must: [¶] (1) State that payments are being withheld in accordance with this provision; [¶] (2) State that the withholding is for a temporary period, as stated in paragraph (c) of this section, and cite the circumstances under which withholding will be terminated; [¶] (3) Specify, when appropriate, to which type or types of Medicaid claims withholding is effective; and [¶] (4) Inform the provider of the right to submit written evidence for consideration by the agency.” Subdivision (c) of Title 42 of the Code of Federal Regulations part 455.23 provides: “All withholding of payment actions under this section will be temporary and will not continue after: [¶] (1) The agency or the prosecuting authorities determine that there is insufficient evidence of fraud or willful misrepresentation by the provider; or [¶] (2) Legal proceedings related to the provider’s alleged fraud or willful misrepresentation are completed.”

<sup>4</sup> Section 14107.11, subdivision (a)(2) provides that the Department, upon receipt of reliable evidence of fraud or willful misrepresentation by a provider, may: “Withhold payment for any goods, services, supplies, or merchandise, or any portion thereof. The department shall notify the provider within five days of any withholding of payment under this section. The notice shall do all of the following: [¶] (A) State that payments are being withheld in accordance with this subdivision and that the withholding is for a temporary period and will not continue after it is determined that the evidence of fraud or willful misrepresentation is insufficient or when legal proceedings relating to the alleged fraud or willful misrepresentation are complete. [¶] (B) Cite the circumstances under which the withholding of the payments will be terminated. [¶] (C) Specify, when appropriate, the type or types of claims for which payment is being withheld. [¶] (D) Inform the provider of the right to submit written evidence that would be admissible under the administrative adjudication provisions of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, for consideration by the department.”

Marshall of his right to an administrative appeal. Finally, it stated: “This withhold action will continue until Medi-Cal or prosecuting authorities determine that there is insufficient evidence of fraud or misrepresentation by you; or after legal proceedings related to the alleged fraud or misrepresentation are completed.”

The Department’s withhold notice satisfied the statutory requirements. The question, then, is whether the notice was otherwise unconstitutional, as the trial court found. We answer in the negative. The letter gave Marshall notice of the temporary withhold and an opportunity to either contest the reliability of the evidence of fraud or abuse, or to contest the interpretation of that evidence. Due process does not require more under these circumstances.

*C. Due process.*

Marshall’s notice of withhold was dated May 25, 2000. The Department, however, did not serve its accusation until January 21, 2003, and only after being prompted into action by Marshall’s petition for writ of mandate. The suspension hearing was then scheduled for September 2003. In the trial court’s opinion, “the temporary nature of the withhold [was] . . . simply illusory.”

While we understand the trial court’s position, and we sympathize with Marshall’s plight, we conclude that the withhold was constitutional.

Due process is flexible, and what it requires depends upon the situation. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 334.) In general, courts must consider the following factors: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Citation.]” (*Id.* at p. 335.) Expressly or tacitly, the cases have resolved these factors against claimants such as Marshall.

The withhold in *Bergeron* was precipitated when the California Department of Justice, Bureau of Medi-Cal Fraud began an investigation into a dentist's Medi-Cal billings. (*Bergeron, supra*, 71 Cal.App.4th 20.) Less than a year after the payment withhold, the California Attorney General's Office filed a criminal complaint. (*Id.* at p. 21.) Believing that this process was inadequate, the dentist filed a petition for writ of mandate to compel the Department to conduct an administrative hearing on the propriety of the withhold. (*Id.* at pp. 19, 23.) The trial court denied the petition, and *Bergeron* affirmed. The court stated: "The state and federal interest in maintaining the integrity of the Medi-Cal system and preserving limited resources for those in need justifies the temporary withholding of payments to those believed to be engaged in fraudulent billing practices until there can be a criminal investigation and the initiation of criminal proceedings or a conclusion that the evidence will not support one. Given the procedural notice mechanisms and the opportunity afforded a provider to respond to the withholding notice, the dictates of due process have been met. To find otherwise would force the Department to conduct a fully contested hearing on the issue of whether appellant had engaged in fraudulent billing practices, and force the Bureau to reveal the fruits of its investigation at a premature stage. This would unnecessarily interfere with the federally mandated investigative arm of the Medi-Cal scheme. Moreover, this is a contractual relationship and appellant knew or is charged with knowing the terms governing her contract. She essentially agreed to the withholding mechanism designed to protect the government's interest in minimizing risks to the limited resources posed by fraudulent provider billing practices." (*Id.* at p. 27.)

In *Midwest*, a medical clinic received notice of a temporary withhold of Medicare payments in September 1997. (*Midwest, supra*, 998 F.Supp. at p. 765.) In December of the same year, the medical clinic filed a petition for writ of mandate on the grounds, inter alia, that its due process rights and Fifth Amendment rights were violated. The court stated: "As for plaintiffs' . . . due process claim, i.e. that the failure to provide them a pre-suspension or post-suspension hearing violates their procedural due process rights, this court finds it specious[.]" (*Id.* at p. 770.) Then the court stated: "[I]n regard to

plaintiffs' claim that the Medicare regulations contravene the Fifth Amendment in that they provide for indefinite suspension of payments without a hearing, this court finds that plaintiffs are not likely to succeed. The regulations do not provide for the indefinite suspension of payments. To the contrary, the recently revised regulations set definite time limits on the suspension of payments. Suspensions are limited to 180 days with a possible extension of up to 180 days being granted by the HCFA in limited circumstances. In fact, regulations in effect prior to December 2, 1996 contained no time limits and provided for no pre-suspension or post-suspension hearing, yet they were upheld. [Citations.] Certainly, if prior regulations with no time limits were found constitutional, current regulations with time limits are *a priori* constitutional." (*Id.* at pp. 770-771.)

Other federal cases are consistent with *Midwest*. *Clarinda* held "that it is not a violation of due process to temporarily withhold Medicare payments during an ongoing investigation for acts of fraud." (*Clarinda, supra*, 100 F.3d at p. 531.) *Peterson* is in accord. (*Peterson, supra*, 508 F.2d at p. 50.)

We are cognizant that this case involves a longer delay than there was in *Bergeron*, *Midwest*, *Clarinda* and *Peterson*. However, those cases teach that a claimant has no right to an administrative hearing. Also, Marshall always had the option of filing a petition for writ of mandate to either assert that the evidence of fraud was unreliable, or that the investigation had been abandoned, and then argue that the Department had a mandatory duty to release the payments. Given the state's strong interest in preserving public funds, given Marshall's opportunity to file a written objection, and given that Marshall had the ability to seek writ relief, we hold that the process he received stands up to constitutional scrutiny.

## **DISPOSITION**

The portion of the judgment upholding the suspension of Marshall's Medi-Cal privileges is affirmed. The portion of the judgment requiring the Department to release the withheld funds is reversed.

The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.  
ASHMANN-GERST

We concur:

\_\_\_\_\_, P. J.  
BOREN

\_\_\_\_\_, J.  
DOI TODD